STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2007
v	No. 266088 Wayne Circuit Court
MICHAEL A. CLARK, Defendant-Appellant.	LC No. 05-004753-01

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2), and sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 25 to 50 years. He appeals as of right. We affirm.

I. Underlying Facts

Defendant was convicted of seriously injuring his girlfriend's four-month-old son on April 22, 2005. Defendant and the victim's mother, Andrea Johnson, have a one-year-old daughter together. Johnson became pregnant with the victim by another man while defendant was in jail. Defendant was released when the victim was two months pregnant. Although defendant initially believed he had fathered the victim, questions regarding paternity arose when the victim was 3-1/2 months old. Paternity was subsequently established in May 2005. At the time of the offense, Johnson (aged 16) and her two children lived with her parents in River Rouge. Defendant frequently stayed in the Johnson home.

Johnson testified that on Thursday, April 21, 2005, the victim was released from Children's Hospital after being treated for pneumonia. Several witnesses testified that there were no injuries on the victim's head or body at that time. On the morning of Friday, April 22, 2005, Johnson left the victim with defendant while she attended school. Defendant and the victim were the only people in the house. At that time, there were no injuries on the victim's face or chest. Johnson testified that when she returned home at 3:30 p.m., she noticed marks on the victim's ribs, and a red mark and swelling near his left eye. Defendant told Johnson that he and the victim were sleeping in a bed together, and the victim fell between the bedrail and a bassinet. Johnson did not take the victim to the hospital, and attempted to treat the swelling with ice.

On Saturday, April 23, 2005, Johnson noticed that the victim's eye had "turned black." Phylandria Johnson, the victim's grandmother, testified that when she saw the victim, he had two black eyes. Defendant told Phylandria that the victim had fallen off the bed between the bed and the bassinet. Johnson testified that, on Sunday, April 24, 2005, the victim stopped breathing, and she successfully used her daughter's asthma breathing machine on the victim. Shareyes Wright, a friend, testified that when she saw the victim on Sunday, he "looked sick," was "like blue," and had bruising on his stomach, two black eyes, and a broken blood vessel in his eye. She further testified that the victim's head looked bigger than usual. Defendant told Wright that the victim had fallen off the bed. Wright testified that defendant was nervous and scared, and said that he "didn't want to take the baby to the hospital because of how [the baby] looked." "He could go to jail for it." Wright testified that Johnson was crying, and said she could "get her kids taken away because of how it looked." At trial, Johnson admitted that they were afraid to take the victim to the hospital because of how he looked.

Phylandria's friend, Carolyn Florence, testified that when she saw the victim on Sunday, he had a bruise on his face, and "started shaking" when she touched him. Florence openly questioned the group about why the victim had not been taken to the hospital, and they began "talking, like fussing." She heard defendant say that the baby had fallen out of bed, and that the injuries were not his fault. Ultimately, at about 4:00 p.m. on Sunday, Florence took the victim, defendant, and Johnson to the hospital. While there, Johnson and Florence saw the victim's eyes roll back in his head. Florence noticed clots in the victim's eyes, and a bruise across his chest. The victim subsequently had a seizure, went into a coma, and remained comatose for two days. Johnson indicated that the victim had bleeding in his brain, which necessitated surgery.

A River Rouge police officer questioned defendant at the hospital, and defendant repeated his story that the victim had fallen between a bedrail and a bassinet. The officer testified that the victim had bleeding in his eyes, marks and swelling on his face, and a mark on his right hip. The officer further testified that a mark on the victim's torso "looked like the outline of a hand." Defendant was subsequently arrested and made a statement to the police, essentially indicating that the victim had fallen out of the bed while he was asleep.

Dr. Sandeer Sood, who was qualified as an expert in pediatric neurosurgery, examined the victim at Children's Hospital on Sunday, April 24, 2005. He indicated that the victim suffered severe injuries, including "significant intracranial injury." An external examination showed "swelling on the face and on both eyes," "bilateral ecchymosis around both eyes," which gave the victim a purplish-black appearance, bruising "over the abdomen," and "on the extremities he had small areas of ecchymosis." The expert testified that the victim suffered a skull fracture "on both sides," "swelling on both sides of the brain," subarachnoid hemorrhage, bilateral retinal hemorrhages, and parenchyma hemorrhages on both sides. The expert testified that the swelling was "very recent," "probably in a day or two." The head injuries indicated some type of impact. He further testified that the retinal hemorrhages are a consequence of a rapid "acceleration/deceleration, sudden moving of the head back and forth," also referred to as "shaken baby syndrome." The expert explained that the "combination of injuries" suffered by the victim is "only seen with non accidental trauma," and were not possible from a typical fall from a bed.

II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to convict him of first-degree child abuse because there was no evidence of the requisite specific intent. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the [trier of fact's] verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2). With regard to intent, the prosecution is required to establish beyond a reasonable doubt not only that defendant intended to commit the charged act, but also that he intended to cause serious physical or serious mental harm to the child or knew that serious physical or serious mental harm would be caused by the act. *People v Maynor*, 470 Mich 289, 295; 683 NW2d 565 (2004); MCL 750.136b(2). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citation omitted).

Viewed in a light most favorable to the prosecution, a rational trier of fact could find the required intent for first-degree child abuse. Evidence was presented that the four-month-old victim suffered skull fractures, subarachnoid hemorrhaging, brain swelling, and retinal hemorrhages. He had two black eyes, and bruising and swelling on his face and abdomen area. The expert medical testimony established that there was no medical explanation for the victim's severe injuries. Rather, the victim suffered injuries consistent with being severely shaken, and receiving an impact to the head. There was no dispute that defendant was the only person in the home when the victim was injured. Defendant admitted that the child was injured while in his care, but maintained that the child's injuries were accidental. The expert medical testimony established that the victim's injuries could not have been accidental. Furthermore, defendant did not call for help after the alleged accidental fall, and did not take the child to the hospital until two days later at the behest of others. In fact, there was testimony that defendant stated that he did not want to take the child to the hospital because he could go to jail.

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant intended to seriously harm the four-month-old victim or knew that his acts would cause serious harm. *Maynor*, *supra*. Although defendant argues that evidence of his intent was deficient, the trial court, as the trier of fact, was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The evidence was sufficient to sustain defendant's conviction of first-degree child abuse.

III. Sentence

A. Scoring of Offense Variable (OV) 7

We reject defendant's claim that the trial court abused its discretion in scoring OV 7 of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id*. (Citation omitted).

MCL 777.37(1)(a) directs a score of 50 points if the victim was "treated with sadism, torture, or excessive brutality." The trial court's score of 50 points was supported by the evidence that the four-month-old victim suffered severe injuries consistent with his being severely shaken and receiving an impact to his head. The four-month-old victim suffered skull fractures, subarachnoid hemorrhaging, brain swelling, and retinal hemorrhages. The victim also had two black eyes, and bruising and swelling on his body. This evidence indicates that the four-month-old victim was treated with excessive brutality and supports the trial court's score of 50 points for OV 7.[1]

B. *Blakely v Washington*

We also reject defendant's claim that he must be resentenced because the trial court's factual findings supporting its scoring of the offense variables were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder

[1] Contrary to defendant's cursorily presented argument, there is no prohibition against scoring OV 7 in first-degree child abuse cases as long as adequate evidence supports the score.